IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 23RD JANUARY 2007 / 3RD MAGHA 1928

WP(C).No. 27211 of 2006(M)

PETITIONERS:

1. **V.ANILKUMAR, S/O.RAGHAVAN NAIR, VELUPPAL HOUSE, PAINGOTTUPURAM, KUNNAMANGALAM P.O., KOZHIKODE DISTRICT.**

2. **K.GANGADHARAN, S/O.KANARAKUTTY NAIR, KOODATHALUMMAL HOUSE, P.O.PADANILAM, KUNNAMANGALAM.**

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS:

1. **KERALA STATE ELECTION COMMISSION, THIRUVANANTHAPURAM.**

2. **KUNNAMANGALAM GRAMA PANCHAYAT, REPRESENTED BY ITS SECRETARY, KUNNAMANGALAM.**

3. **O.USSAIN, S/O.MOOSA, OLONGAL VEEDU, PANTHEERPADAM, KUNNAMANGALAM P.O., KOZHIKODE.**

4. **KHALID.K.P., S/O.MOOSA, KOODATHALUMMAL HOUSE, KUNNAMANGALAM P.O., KOZHIKODE.**

BY ADV. SRI.MURALI PURUSHOTHAMAN, SC,K.S.E.COMM for R1
SRI.T.R.RAMACHANDRAN NAIR for R4
SRI.V.G.ARUN
SRI.K.A.SALIL NARAYANAN for R2
SRI.P.SANJAY
SRI.M.MUHAMMED SHAFI
SRI.ANIL K.NARENDRAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE NOTICE BEARING NO.A1/1119/2006 DTD.2/06/2006 ISSUED BY THE SECRETARY OF THE PANCHAYAT.

EXT.P2: COPY OF THE PETITION FILED BY THE 3RD RESPONDENT BEFORE THE PANCHAYAT DTD. 5/06/2006.

EXT.P3: COPY OF THE DECISION OF THE PANCHAYAT COMMITTEE ON 1/07/2006.

EXT.P4: COPY OF THE ORDER PASSEDC IN WP(C) NO.21124/2006 DTD. 09/08/2006.

EXT.P5: COPY OF THE ORDER IN O.P.NO.8/2006 OF THE KERALA STATE ELECTION COMMISSION, TRIVANDRUM DTD. 17/08/2006.

EXT.P6: COPY OF THE ORDER IN O.P.23/2006 OF THE KERALA STATE ELECTION COMMISSION, TRIVANDRUM DTD. 17/08/2006.

EXT.P7: COPY OF THE PETITION FILED U/S 36(1) R/W 37(2) OF THE KERALA PANCHAYAT RAJ ACT FILED BY THE 4TH RESPONDENT BEFORE THE 1ST RESPONDENT DTD.11/08/2006.

EXT.P8: COPY OF THE JUDGMENT IN WP(C) NO.23395/06 OF THIS HON'BLE COURT DTD. 30/08/2006.

EXT.P9: COPY OF THE STATEMENT OF OBJECTION FILED BY THE PETITIONERS BEFORE THE ELECTION COMMISSION SEPTEMBER 2006.

EXT.P10: COPY OF THE ORDER PASSED BY THE KERALA STATE ELECTION COMMISSION, TRIVANDRUM IN I.A.33/06 IN O.P.NO.42/06 DTD. 3/10/2006.

2ND RESPONDENT'S EXHIBITS:

EXT.R2(A): COPY OF THE APPLICATION PREFERRED BY A VOTER BEFORE THE GOVERNMENT, UNDER SEC.191 OF THE PANCHAYATH RAJ ACT.

EXT.R2(B): COPY OF THE ORDER BY THE GOVERNMENT FORWARDING THE APPLICATION TO THE GOVERNMENT.

...2/-

WPC.NO.27211/2006 M

5TH RESPONDENT'S EXHIBITS:

EXT.R5(A): **COPY OF PETITION DTD. 14/08/2006 SUBMITTED BY THE PETITIONER BEFORE THE GOVERNMENT.**

EXT.R5(B): **COPY OF GOVERNMENT ORDER DTD. 27/06/2006 REFERRING EXHIBIT R5(A) PETITION TO THE OMBUDSMAN FOR LOCAL SELF GOVERNMENT INSTITUTIONS.**

/TRUE COPY/

Kss

PIUS C. KURIAKOSE, J.

W.P.(C) No. 27211 OF 2006

Dated this the 23rd day of January, 2007

JUDGMENT

The 1st petitioner is an elected member of Ward No.14 of Kunnamangalam Panchayat in Kozhikode District and the 2nd petitioner is a voter from that Ward. The 3rd respondent was elected as Member of Ward No.6 of the Panchayat. On account of his continuous absence in the Welfare Standing Committee meeting of the Panchayat of which also he was a member for four times continuously, he entailed a disqualification and therefore the 1st petitioner filed petition before the 1st respondent-Election Commission seeking to disqualify the 3rd respondent under Section 35(k) of the Kerala Panchayat Raj Act, 1994 (hereinafter referred to for short as 'the Act'). The above petition was filed on 31.5.2006. During the pendency of that petition, the Secretary of the Panchayat issued notice under Section 37(2) of the Act informing the 3rd respondent of his entailment of disqualification under Section 35(k) and Ext.P1 dated 2.6.2006 is copy of that notice. After receiving Ext.P1, the 3rd respondent filed the original of Ext.P2 petition before the Panchayat under Section 37(2) of the Act seeking restoration of his membership. The Committee of the 2nd respondent-Panchayat,

considered Ext.P2 and dismissed the same vide Ext.P3 decision. The petitioners contend that due to passage of Ext.P3, Ext.P2 has become final and that Ext.P2 notice has become merged into Ext.P3 decision. The petitioners then state that after Ext.P3, the 3rd respondent filed a petition under Section 36(1) of the Act which was admitted and numbered by the Election Commission as O.P.No.23 of 2006. The 1st petitioner, on coming to know about that O.P. which according to him was not at all maintainable, approached this Court and filed a Writ Petition wherein this Court on 9.8.2006 passed Ext.P4 interim order directing the Election Commission to take a decision on the question of maintainability of the O.P. Ext.P4 was produced before the 1st respondent-Election Commission before whom O.P.23 of 2006 and O.P.8 of 2006 came up for consideration. The 1st petitioner withdrew from O.P.8 of 2006 since the same was not necessary in the light of Ext.P2 notice. O.P.23 of 2006 was also dismissed as not pressed. Exts.P5 and P6 are copies of the orders passed by the 1st respondent in O.P.No.8 of 2006 and O.P.No.23 of 2006 respectively. In Ext.P5 order dismissing O.P.No.8 of 2006, the Election Commission has made an observation that the dismissal of that O.P. as withdrawn will not stand in the way of any member of the Panchayat or even a voter approaching the Election Commission

for adjudication of the issue of disqualification. Petitioners contend that the above observation is unwarranted and runs contrary to the dictum laid down by this Court in **Rajan v. Kerala State Election Commission** (1999 (3) KLT 601) and challenges Ext.P5 to the extent it contains the above observation. The petitioners then states that on the strength of the above observation in Ext.P5, the 4th respondent who is a voter of Ward No.6 of the Panchayat filed Ext.P7 petition before the Election Commission under Section 36(1) read with Section 37(2) of the Act. The petitioners contend that Ext.P7 is not at all maintainable before the Election Commission for various reasons. According to them, Ext.P3 decision could not have been challenged by any voter in the light of the decision in **Rajan's** case (1999 (3) KLT 601). Apprehending that in view of the observation contained in Ext.P5, the 1st respondent may proceed with Ext.P7 petition without even considering its maintainability, the petitioners approached this Court again by filing W.P.(C)No.23395 of 2006 seeking various reliefs including a declaration that a petition filed by a voter under Section 36(1) of the Act against disqualification under Section 35(k) is not maintainable before the Election Commission, if the same is filed subsequent to the order passed by the Panchayat in a restoration petition filed under Section

37(2) of the Act. That Writ Petition was disposed of by this Court by Ext.P8 judgment. Pursuant to Ext.P8 judgment, the petitioners appeared before the Election Commission and got themselves impleaded by filing impleadment application which was allowed. Thereafter, they filed Ext.P9 detailed statement of objections raising several contentions regarding the maintainability of Ext.P7 petition. The question of maintainability was heard in detail by the Election Commission which passed Ext.P10 order on 3.10.2006 holding that Ext.P7 is maintainable. The petitioners impugn Ext.P10 on various grounds and have filed this Writ Petition seeking quashment of Ext.P10 and for a declaration that the petition filed by a voter under Section 36(1) of the Act against disqualification of a member under Section 35(k) of the Act is not maintainable, if the same is filed subsequent to an order passed by the Panchayat in a restoration petition. Yet another relief which is sought for in the Writ Petition is a direction to the 1st respondent-Election Commission to conduct bye-election in Ward No.6 forthwith.

2. When the Writ Petition came up for admission, Sri.Murali Purushothaman, Standing Counsel for the Election Commission took notice on behalf of the 1st respondent; and on behalf of the 4th respondent, the petitioner before the Election Commission,

Sri.T.R.Ramachandran Nair took notice. On issuing urgent notice on admission, the 2nd respondent-Panchayat entered appearance through Advocate Sri.K.A.Salil Narayanan and I.A.No.867 of 2007 has been filed by Mr.Vijesh P.M., a voter of Ward 6 of the Panchayat seeking his impleadment on the ground that it was he who had filed a petition before the Government for cancelling the resolution of the Panchayat rejecting the application for restoration and seeking to restore membership to the 3rd respondent.

3. As directed by me, the Standing Counsel for the 1st respondent-Election Commission filed a statement justifying Ext.P10 order. It is contended therein that the very maintainability of the Writ Petition, in which an interlocutory order passed by the Commission holding that a petition pending before the Election Commission is maintainable is challenged, is in doubt. Referring to the judgment of the Division Bench in **Rajan's** case, it is submitted that the grounds raised in the Writ Petition are covered against the petitioners by that judgment.

4. The Secretary of the Panchayat has filed a counter affidavit. It is stated therein that the 3rd respondent was continuously absent in the Welfare Standing Committee meetings of the Panchayat in spite of proper notice. Therefore, notice under Section 37(2) of the

Act was issued to him, intimating him regarding his entailment of disqualification. On receiving that notice, he filed a restoration application under Section 37(2) on 5.6.2006. That application was considered by the Panchayat which took a decision to reject his request. It is contended that the 3rd respondent having already admitted that he has entailed a disqualification under Section 35(k), no question subsists for consideration as to whether a member has become disqualified or not. Therefore, any further adjudication to determine whether a member has become disqualified is unwarranted and unnecessary. Virtually supporting the grounds raised by the writ petitioners, it is contended that no member of the Panchayat can have any overriding right than the disqualified member to have an adjudication of the question of disqualification and therefore Ext.P7 petition pending before the Election Commission is liable to be rejected by the 1st respondent-Election Commission. It is then pointed out that a voter of Ward 6 has already preferred an application before the Government under Section 191 seeking to cancel the resolution passed by the Panchayat refusing to restore the membership of the 3rd respondent. Ext.R2(a) is copy of that application. The Government has referred that application to the Ombudsman under Section 191(2) and Ext.R2

(b) is copy of the order forwarding that application to the Ombudsman.

5. The 4th respondent who is the petitioner in Ext.P7 petition has also filed a counter affidavit wherein it is contended that the Writ Petition itself is not maintainable, Ext.P10 being only a preliminary order and the final order is yet to be passed by the Election Commission. The objective in instituting the Writ Petition is only to delay trial and consideration by the Election Commission. Such an objective may not be permitted to be achieved considering the limits of this Court's jurisdiction under Article 226 of the Constitution, it is contended. Referring to the quality of Ext.P10 order, it is stated that Ext.P10 is a well considered order which takes care of all the contentions raised by the parties. On that reason also it is contended that Ext.P10 is not liable to be corrected. This counter affidavit also refers to the judgment in **Rajan's** case and contends that on the principles laid down therein, voters like the 4th respondent are entitled to challenge the action of the Panchayat.

6. As already stated, I.A.No.867 of 2007 is filed by a voter of Ward 6 seeking impleadment. In support of that I.A.. he has filed Ext.R5(a) copy of petition dated 14.8.2006 filed by him before the Government and Ext.R5(b) copy of the order forwarding that

application to the Ombudsman.

7. It was elaborate submissions which were addressed before me by Sri.P.V.Kunhikrishnan, learned counsel for the petitioners who was supported in his submissions by Sri.Salil Narayanan, learned counsel for the Panchayat. I also heard the submissions of Mr.V.G.Arun, counsel for the 4th respondent and Mr.Anil K.Narendran, counsel for the petitioner in I.A.No.867/07, an application for impleadment in which the petitioner in the I.A. sought for his impleadment as an additional respondent in the Writ Petition. Mr.Murali Purushothaman, Standing Counsel addressed me on behalf of the Election Commission.

8. Mr.P.V.Kunhikrishnan would refer to Exts.P1, P2, P3, P5, P4, P6, P7, P8, P9 and P10 during the course of his submissions. Learned counsel also referred to Sections 36 and 37 of the Panchayat Raj Act apart from citing the judgment of the Division Bench of this court in **Rajan v. Kerala State Election Commission** (1999(3) KLT 601) and the judgment of the Supreme Court in **Amba Bai v. Gopal** [(2001) 5 S.C.C. 570].

9. Mr.V.G.Arun, counsel for the 4th respondent making submissions on the basis of the counter affidavit submitted by that respondent referred to Sections 35, 36 and 37 of the Panchayat Raj

Act. Learned counsel would rely on the judgment of the Supreme Court in **State of Madras v. Madurai Mills** (AIR 1967 S.C. 681) to answer the argument of Mr.Kunhikrishnan based as it was on the judgment of the Supreme Court in **Amba Bai v. Gopal** (supra) that the principles of merger shall apply and therefore the Election Petition presently filed is not maintainable in law. Mr.Arun relied on the judgment of the Supreme Court in **D.P.Maheshwari v. Delhi Administration** [(1983) 4 S.C.C. 293] and also that of this court in **Radhakrishnan v. Kerala Lok Ayukta** (2006(1) KLT 661) that interfering with interim orders in exercise of jurisdiction for judicial review is deprecated by the Supreme Court. Mr.Arun would highlight that the question whether the third respondent had entailed a disqualification had not so far been adjudicated by any independent adjudicating authority. The decision of the Panchayat Committee was on political considerations only and such decisions as always rest on the political equations in the current Council of the Panchayat.

10. Mr.Murali Purushothaman, Standing Counsel for the Election Commission would support the submissions of Mr.Arun on the basis of the detailed statement already filed by him on 27.10.2006. According to him, the issue which is now raised by the

petitioner has already been answered by the Division Bench in **Rajan's** case (supra) though perhaps not in so many words. The Election Commission was bound to hold that the present complaint is maintainable in view of the observations of the Division Bench in **Rajan's** case which clearly provide that voters of the division or the ward in question are also entitled to approach the Election Commission. The apprehension voiced by Mr.Kunhikrishnan and Mr.Salil Narayanan, counsel for the Panchayat that on the view presently taken by the Election Commission in the impugned order it may be possible for each one among hundreds of voters in a division to approach the Election Commission with like complaints at any point of time is totally misplaced, submits Mr.Murali Purushothaman.

11. Mr.Anil K.Narendran, learned counsel for the petitioner in I.A.No.867/07 submitted that it was his client who filed petition under Section 191(1) of the Act before the Government seeking cancellation of the resolution of the 1st respondent-Panchayat from resolution No., i.e. Resolution No.68/2006 and restoration of the membership of the third respondent and it was on that petition that the Government referred the matter to the Ombudsman under Section 191(2) of the Panchayat Raj Act. Therefore his client has got every right to be heard in the matter.

12. I have considered the rival submissions addressed before me in the light of the pleadings raised by all the parties, the materials placed on record and the judicial precedents cited at the Bar. The issue is whether Ext.P10 order of the Election Commission, holding that the Petition filed by the 4th respondent (Ext.P7) before the Election Commission is maintainable in law and is not liable to be thrown out as not maintainable, is liable to be interfered with. It is Section 35 of the Act which deals with disqualification of the members of the Panchayat. Going by Section 35(k) subject to the provisions of Section 36 or Section 102, a member of the Panchayat shall cease to hold office as such if he absents himself without the permission of the Panchayat concerned from its meeting or the meeting of the Standing Committee thereof for a period of three consecutive months reckoned from the date of commencement of his term of office or of the last meeting that he attended or of the restoration to office as member under sub-section (1) of Section 37, as the case may be, or if within the said period, only in less than three meetings of the Panchayat or of the Standing Committee as the case may be, have been held, absents himself from the three consecutive meetings held after the said date. Section 36(1) of the Panchayat Raj Act provides as follows:

> "Whenever a question arises as to whether a member has become disqualified under Section 30 or Section 35 except clause (n) thereof after having been elected as a member, any member of the Panchayat concerned or any other person entitled to vote at the election in which the member was elected, may file a petition before the State Election Commission, for decision."
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> (underlining supplied)

Section 36(3) provides that a petition or reference referred to in sub-section (1) shall be disposed of in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Central Act 5 of 1908) when trying a suit. Section 37 of the Panchayat Raj Act provides for restoration of membership.

13. Section 37 of the Panchayat Raj Act reads as follows:

"37 : Restoration of membership:- (1) Where a person ceases to be a member of a Panchayat at any level under Section 31 or clause (a) of Section 35, he shall be restored to office for such portion of the period for which he was elected as may remain unexpired at the date of such restoration, if and when the sentence is annulled on appeal or revision or the disqualification caused by the sentence is removed; and any person elected to fill the vacancy

in the interim shall, on such restoration, vacate office.

(2) Where a person ceases to be member under clause (k) of Section 35 the Secretary of the Panchayat concerned shall at once intimate the fact in writing to such person and report the same at the next meeting of the Panchayat. If such person applies for restoration to the Panchayat on or before the date of its next meeting or within fifteen days of the receipt by him of such intimation, the Panchayat may at the meeting next after the receipt of such application restore him to his office of member:

Provided that a member shall not be restored more than twice during his term of office."

14. A person who receives an intimation from the Secretary of the Panchayat under Section 37(2) of the fact that he has entailed a disqualification under Section 35(k) and therefore ceased to be a member has two remedies. One of the remedies is that he can apply for restoration of membership to the Panchayat and the other remedy is that he can apply to the Election Commission under Section 36 disputing the disqualification and seeking adjudication of the question as to whether he has become disqualified. The remedy of restoration in many cases will be more convenient from the point of view of the member who entails disqualification. If he invokes the

remedy of applying for restoration to the Panchayat, then he cannot seek an adjudication of the question by the Election Commission since, as rightly submitted by the learned counsel for the petitioner and the Panchayat, the very application for restoration by a member pre-supposes an admission by the member that he has entailed disqualification. The remedy of seeking an adjudication under Section 36 is a remedy which is available. But then Section 36 gives the right to apply to the Election Commission for adjudication not to a disqualified member alone but also to other members of the Panchayat and even to a voter of the Panchayat. This position does not admit of any doubt and the law on the point has been succinctly laid down in paragraph 10 of the judgment in **Rajan's** case by the Division Bench. Of course, Sri.P.V.Kunhikrishnan is in a way right when he submits that the effect of disposal of an application for restoration and the pendency of an appeal against such dismissal before the Government on a subsequent application under Section 36 filed by the voter has not been specifically considered by the Division Bench in **Rajan's** case. But the principles laid down by the Supreme Court in **State of Madras v. Madurai Mills Co., Ltd.**[AIR 1967 SC 681] on the doctrine of merger will certainly indicate that the above doctrine which is sought to be pressed into service by

Sri.Kunhikrishnan and Sri.Salil Narayanan will not be applicable in this case. The facts which obtained in **Ambabai's** case [2001(5) SCC 570] are not comparable at all to the facts which obtain in this case.

15. All said and done, it is only a preliminary question which has now been decided by the Election Commission by the impugned order. The judgment of the Supreme Court in **D.P.Maheswaran's** case [1983 (4) SCC 293] will show that the Supreme Court deprecates the practice of impugning such preliminary decisions which will inevitably lead to the delaying of the final disposal of the case. A learned judge of this Court had occasion to follow **D.P. Maheswari**'s case [1983(4) SCC 293 and also **Radhakrishnan**'s case [2001 (6) KLT 661]

16. Having gone through the decisions cited, I do not find any warrant for interference by this Court under Article 226. After all, no authority has so far adjudicated in real and meaningful sense of the term the issue of the 3rd respondent's liability for disqualification under Section 35(k). The decision by the Panchayat was essentially a political one and cannot be described as an adjudication unlike the adjudication which is expected to be made by the Election Commission under Section 36 which is a full fledged adjudication

which will be covered by the procedure followed by the Code of Civil Procedure.

The Writ Petition will therefore stand dismissed. No costs.

(PIUS C. KURIAKOSE, JUDGE)

tgl/btt